No. 49099-4-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

MICHAEL STEPHEN BOUGARD,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT
OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Katherine M. Stolz

BRIEF OF APPELLANT

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A. INTRODUCTION

"It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial." *Drope v. Missouri*, 420 U.S. 162, 171, 95 S. Ct. 896, 15 L. Ed. 2d 103 (1975). Michael Stephen Bougard should not have been subjected to a trial.

Twenty-seven days after the court found Bougard competent to stand trial, the court appointed an expert to examine Bougard's mental condition, including his competency to stand trial. Four months later during a pretrial hearing, defense counsel informed the court that the evaluation was not done because Bougard did not cooperate. At trial, defense counsel informed the court that Bougard wanted to wear his jail clothes for the trial. When the trial court advised Bougard to dress in civilian clothes, he did not respond. Bougard continued to wear his jail clothes throughout the trial and did not respond whenever the court and defense counsel asked him questions pertaining to his defense. After the State rested, because Bougard did not respond when asked if he wished to testify, defense counsel rested without presenting opening argument or calling witnesses.

The record substantiates that there was reason to doubt Bougard's competency to stand trial where he did not appear to have the capacity to

understand the nature of the proceedings and assist in his defense. The trial court erred in failing to order an evaluation of Bougard's competency to stand trial and Bougard received ineffective assistance of counsel where defense counsel failed to request an evaluation. Reversal is required because Bougard was deprived of his due process right to a fair trial.

B. ASSIGNMENTS OF ERROR

1. The trial court erred in failing to order an evaluation of the mental condition of the appellant.

2. Defense counsel provided ineffective assistance of counsel in failing to request an evaluation of the mental condition of the appellant.

3. Appellant was deprived of his due process right to a fair trial.

4. In the event the State substantially prevails on appeal, this Court should deny any requests for costs.

C. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Is reversal required because the trial court abused its discretion in failing to order a mental evaluation of appellant's competency to stand trial where there was reason to doubt his competency based on his irrational behavior of wearing jail clothes and not responding at all throughout the proceedings?

2. Is reversal required because defense counsel's representation was deficient in failing to move for a competency evaluation

in light of appellant's irrational behavior and appellant was prejudiced by counsel's deficient representation which deprived him of his due process right to a fair trial?

3. If the State substantially prevails on appeal, should this Court exercise its discretion and deny costs where appellant is presumably still indigent because there has been no evidence provided to this Court that his financial condition has improved or is likely to improve?

D. STATEMENT OF THE CASE[1]

1. Procedure

On July 10, 2015, the State charged appellant, Michael Stephen Bougard, with assault in the second degree involving domestic violence and aggravating factors. CP 1-2. The Information alleged that Bougard intentionally assaulted the victim within sight of a minor child. CP 1-2. On July 28, 2015, the Honorable Jack Nevin held a competency hearing and ordered a competency evaluation at Western State Hospital. RP 07/28/15 RP 2-3; CP 14-18. The court subsequently held a competency hearing on December 2, 2015, and found Bougard competent to stand trial. 12/02/15 RP 4-6; CP 36-37. On December 29, 2015, the court entered an order

[1] The verbatim report of proceedings are referred to by dates: 07/28/15; 12/02/15; 04/13/16; and trial proceedings by RP and the page number.

appointing an expert to examine Bougard's mental condition, including his competency to stand trial. CP 46-47.

Following a pretrial hearing on April 13, 2016, before the Honorable James Orlando, the case proceeded to trial before the Honorable Katherine Stolz on May 16, 2016. RP 2-12; RP 3. On May 24, 2016, a jury found Bougard guilty as charged. RP 300-04, CP 117-20. On June 24, 2016, the court sentenced Bougard to an exceptional sentence of 18 months with 18 months of community custody and imposed mandatory costs. RP 319-20; CP 207-22, 225-27.

Bougard filed a timely notice of appeal. CP 186-98.

2. Facts

At the pretrial hearing, when defense counsel asked Bougard if he had an objection to the continuance requested by the State, he did not respond. RP 6. Then defense counsel informed the court that Bougard has not cooperated with a defense request for a psychological evaluation which has prevented counsel from claiming a diminished capacity defense. RP 6-7. The court observed that Bougard refused to dress in civilian clothes so he was wearing jail clothes and has "taken sort of an antagonistic approach to his defense from day one in this case." RP 9-10. The court directed defense counsel to submit briefing on his proposed defense. RP 10-11.

After the trial began, the court noted that Bougard was not dressed in civilian clothes. Defense counsel explained that Bougard "has the opportunity to switch into civilian clothes. He has opted not to take advantage of that option, and he wishes to proceed wearing his jail clothes." RP 22. When defense counsel asked Bougard if that was correct, he did not answer. RP 22-23. The court advised Bougard that he is offered civilian clothes so that the jury is not improperly influenced by the fact that he is in custody. The court urged Bogard to take advantage of civilian attire, but told him "if you wish to refuse to dress out, then it's your choice." RP 23. Defense counsel moved to exclude any reference to the fact that Bougard is in jail clothes and the court replied that "we will all remain totally silent regarding his choice of attire." RP 24.

Bougard continued to appear in court dressed in jail clothes throughout the trial. RP 67, 182, 241. The State called six witnesses to testify, including the alleged victim and minor child. RP 86-211. After the State rested, the court asked defense counsel if Bougard was going to testify. Counsel explained that Bougard has not told him if he will or will not testify and he "obviously has not really participated in the trial." RP 215-17. During a recess, counsel informed the court that he asked Bougard if he decided whether to testify and he did not respond. RP 218. Then the court asked Bougard if he wanted to testify and received no response, which the

court construed as a waiver of his right to testify. RP 219. Defense counsel rested without presenting an opening statement and without calling any witnesses. RP 215-19. After the court dismissed the jury to begin deliberations, the court discussed the procedure for allowing the jury to listen to a 911 tape. When defense counsel asked Bougard whether he wanted to be present in court if the jury listens to the 911 tape, Bougard did not say "anything one way or the other." RP 298-99.

E. ARGUMENT

1. THE TRIAL COURT ERRED IN FAILING TO ORDER AN EVALUATION OF BOUGARD'S MENTAL CONDITION WHERE THERE WAS REASON TO DOUBT HIS COMPETENCY TO STAND TRIAL AND BOUGARD RECEIVED INEFFECTIVE ASSISTANCE OF COUNSEL WHERE DEFENSE COUNSEL FAILED TO REQUEST A COMPETENCY EVALUATION.

Under the Due Process Clause of the Fourteenth Amendment of the United States Constitution, an accused in a criminal trial has a fundamental right not to stand trial unless legally competent. *Pate v. Robinson*, 383 U.S. 375, 378, 86 S. Ct. 836, 15 L. Ed. 2d 815(1966)(conviction of an accused while he is legally incompetent violates due process); *Drope v. Missouri*, 420 U.S. 162, 171-72, 95 S. Ct. 896, 43 L. Ed. 2d 103 (1975)(it is a fundamental due process right not to be tried while legally incompetent); *Medina v. California*, 505 U.S. 437, 439, 112 S. Ct. 2572, 120 L. Ed. 2d 353 (1992)(it is well established that due process prohibits the criminal

prosecution of person not competent to stand trial). The constitutional standard for competency to stand trial is whether the accused has sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding and to assist in his defense with a rational as well as factual understanding of the proceedings against him. *Dusky v. United States*, 362 U.S. 402, 80 S. Ct. 788, 4 L. Ed. 2d 824 (1960).

Washington law affords greater protection by providing that "[n]o incompetent person may be tried, convicted, or sentenced for the commission of an offense so long as such incapacity continues." RCW 10.77.050; *In re Personal Restraint of Fleming*, 142 Wn.2d 853, 862, 16 P.3d 610 (2001). "Requiring that a criminal defendant be competent has a modest aim: It seeks to ensure that he has the capacity to understand the proceedings and to assist counsel." *Fleming*, 142 Wn.2d at 862 (quoting *Godinez v. Moran*, 509 U.S. 389, 402, 113 S. Ct. 2680, 125 L. Ed. 2d 321 (1993)). Under Washington law, a person is incompetent if he or she "lacks the capacity to understand the nature of the proceedings against him or her or assist in his or her own defense as a result of mental disease or defect." RCW 10.77.010(15).

The determination of whether a competency evaluation should be ordered rests generally within the discretion of the trial court. *State v. Thomas*, 75 Wn.2d 516, 518, 452 P.2d 256 (1969). The factors a trial court

may consider in determining whether to order a competency evaluation include the "defendant's appearance, demeanor, conduct, personal and family history, past behavior, medical and psychiatric reports and statements of counsel." *State v. Dodd*, 70 Wn.2d 513, 514, 424 P.2d 302 (1967). Procedures of the competency statute RCW 10.77 are mandatory and not merely directory. *State. v. Wickland*, 96 Wn.2d 798,805, 638 P.2d 1241 (1982).

a. The trial court abused its discretion in failing to order an evaluation of Bougard's competency to stand trial.

Under RCW 10.77.060, when there is reason to doubt the competency of a defendant, the trial court must order an expert to evaluate the defendant's mental condition. Following the evaluation, if the court finds the defendant incompetent, it must stay the proceedings against the defendant. RCW 10.77.086(1)(a). The record here substantiates that the trial court had reason to doubt Bougard's competency to stand trial.

Before motions in limine, defense counsel informed the court that Bougard wanted to dress in jail clothes for the trial. RP 22. When defense counsel asked Bougard if that was correct, there was no audible response, which prompted the court to advise Bougard of the potential consequences of wearing jail clothes:

> All right. Mr. Bougard, you realize that we offer you the opportunity to dress out in civilian attire so that the fact that you are in custody is not something that is known to the jury so that they don't make a decision based on the fact or have allowed that to influence them, the fact that you are in custody; so at this time, you are -- *my understanding, you are refusing to put on civilian attire, apparently refusing to discuss that issue one way or the other*; so you have been, at this point, advised that we would strongly urge you to take advantage of civilian attire and wear it; but if you wish to refuse to dress out, then it's your choice. All right?

RP 23 (emphasis added).

The record does not reflect any response from Bougard. RP 23. Then defense counsel added a motion in limine "to exclude the State from making any reference to the fact that he is in jail clothes. It'll be obvious enough, I think." RP 24. The court made light of the matter, commenting that it did not think "the State needs to guild the lily." RP 24. The court declared that "we will all remain totally silent regarding his choice of attire." RP 24.

At this juncture, the court had reason to doubt Bougard's competency to stand trial because it was evident that he had no rational understanding of the prejudicial effect of wearing jail clothes, he was not responding to defense counsel or the court, and he was not assisting in his defense. A defendant's right not to appear in jail clothes stems from the defendant's presumption of innocence and a right to be free from measures that unfairly prejudice the jury. *Estelle v. Williams*, 425 U.S. 501, 503-05,

96 S. Ct. 1691, 48 L. Ed. 2d 126 (1976). The lack of any response after the court advised Bougard of the peril of proceeding to trial in jail clothes cast doubt on his capacity to understand the nature of the proceedings and assist in his defense. To implement the presumption of innocence, "courts must be alert to factors that may undermine the fairness of the fact-finding process." *Estelle*, 425 U.S. at 503. A defendant's jail clothing is "likely to be a continuing influence throughout the trial" which poses an "unacceptable risk of impermissible factors coming into play." *Estelle*, 425 U.S. at 504. Inexplicably, the court completely ignored what was clearly a red flag and proceeded with the trial. Consequently, Bougard continued to wear his jail clothes throughout the trial. RP 67, 182, 241.

After the State rested, the court asked defense counsel if Bougard was going to testify. Defense counsel said Bougard has not told him so presumably he would not testify and therefore counsel would not present opening argument and rest. RP 215. Counsel explained further:

> Mr. Bougard, *obviously, has not really participated in the trial.* He's still in jail clothes. He's not in restraints and has not been in restraints at any time that the jury has seen that I'm aware of; and it may give the impression when one reads the record, he's kind of comatose, more or less. He is awake. He is paying attention as far as I can tell.

RP 216-17 (emphasis added).

Subsequently, the court asked Bougard if he wanted to testify:

> Mr. Bougard, I realize that you're refusing to answer or whatever; but at this time, the Court is going to make a request on the record if you wish to testify. If you do not answer, the Court will construe that as you do not wish to testify in this matter; so I think he's waived that.

RP 219.

When Bougard gave no response, the court called for the jury. RP 219.

During deliberations, the court discussed the procedure for the jury listening to the 911 if it requested to do so. When defense counsel asked Bougard if he wished to be in court if the jury listens to the 911 tape, he did not respond. RP 298-99.

The record substantiates that Bougard did not participate at all in his trial. It is evident from the record that there was reason to doubt whether he had the capacity to understand the nature of the proceedings or assist in his defense. Failure to observe procedures adequate to protect an accused's right not to be tried while incompetent to stand trial is a denial of due process. *State v. Neal*, 23 Wn. App. 899, 901, 600 P.2d 570 (1979)(citing *Drope v. Missouri*, 420 U.S. 162 (1975); *Pate v. Robinson*, 383 U.S. 375 (1996)). In light of Bougard's irrational behavior of appearing in jail clothes and not assisting in his defense throughout the trial, reversal is required because the trial court abused its discretion in failing to order an evaluation of Bougard's mental condition.

b. Defense counsel's performance was deficient in failing to move for an evaluation of Bougard's competency to stand trial and Bougard was prejudiced by counsel's deficient performance which deprived him of his due process right to a fair trial.

The Sixth Amendment to the United States Constitution and art. I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *State v. Thomas*, 109 Wn.2d 222, 229, 743 P.2d 816 (1987). "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." *Thomas*, 109 Wn.2d at 225.

To demonstrate ineffective assistance of counsel, a defendant must show that (1) defense counsel's representation was deficient, i.e., it fell below an objective standard of reasonableness based on consideration of all the circumstances; and (2) defense counsel's deficient representation prejudiced defendant, i.e. there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceedings would have been different. *State v. McFarland*, 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995)(citing *Thomas*, 109 Wn.2d at 225-26)(applying the two-prong test in *Strickland*, 466 U.S. at 687)).

There is a strong presumption that counsel has rendered adequate assistance and has made all significant decisions by exercising reasonable professional judgment. *State v. Lord*, 117 Wn.2d 829, 883, 822 P.2d 177 (1991). A criminal defendant can rebut the presumption of reasonable performance by showing that there "is no conceivable legitimate tactic that explains counsel's performance." *State v. Grier*, 171 Wn.2d 17, 33, 246 P.3d 1260 (2011). If counsel's conduct can be characterized as "legitimate trial strategy or tactics," it cannot serve as a basis for a claim of ineffective assistance of counsel. *Lord*, 117 Wn.2d at 883.

The record here substantiates that Bougard was not participating or assisting in his defense. RP 22-24, 67, 182, 241, 215-19, 298-99. Prior to trial, defense counsel informed the court that Bougard was preventing him from presenting his theory of the case:

> Mr. Bougard has not cooperated in any of the psychological evaluations at Western State. He did not cooperate with the defense request for a psychological evaluation, so I'm not in a position to actually offer a formal diminished capacity defense because there has been no expert who has evaluated him.

RP 6-7.

Although defense counsel was not Bougard's counsel at the time, his reference to the evaluations shows that he was aware of the mental health evaluations conducted on July 28, September 3, and December 4, 2015. CP 8-13, 27-35, 38-45. Regardless of the fact that the last evaluation concluded

that Bougard was competent, the evaluations raised concerns about Bougard's mental condition. In light of Bougard's irrational behavior at trial, defense counsel's representation was deficient in failing to bring Bougard's mental history to the court's attention and move for an evaluation of Bougard's present competency to stand trial. Bougard was prejudiced by defense counsel's deficient performance because he was subjected to standing trial in violation of his due process right to a fair trial. As defense counsel observed, Bougard did not participate or assist in his defense, "he's kind of comatose." RP 216. Moreover, Bougard's irrational behavior of appearing in jail clothes, despite being advised of the inherent prejudicial effect, raised doubt about his capacity to understand the nature of the proceedings.

Bougard was denied his right to effective assistance of counsel where there was no strategic or tactical reason for defense counsel to allow his client to proceed in an unconstitutional trial. Defense counsel's representation fell below an objective standard of reasonableness and there is a reasonable probability that, under the circumstances, if counsel had moved for a competency evaluation the court would have stayed the proceedings and ordered an evaluation as required under RCW 10.77. Bougard's conviction must therefore be reversed. *See Fleming,* 142 Wn.2d at 865-67 (when defense counsel knows or has reason to know of a

defendant's incompetency, tactics cannot excuse failure to raise competency at any time).

2. IF THE STATE SUBSTANTIALLY PREVAILS ON APPEAL, THIS COURT SHOULD EXERCISE ITS DISCRETION AND NOT AWARD COSTS BECAUSE BOUGARD REMAINS INDIGENT.

Under RCW 10.73.160 and Rules of Appellate Procedure Title 14, this Court may award costs to a substantially prevailing party on appeal. RAP 14.2 provides in relevant part:

> A commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless the appellate court directs otherwise in its decision terminating review.

National organizations have chronicled problems associated with legal financial obligations (LFOs) imposed against indigent defendants. These problems include increased difficulty in reentering into society, the doubtful recoupment of money by the government, and inequity in administration. *State v. Blazina*, 182 Wn.2d 827, 835, 344 P.3d 680 (2015)(citing, et al., AM. CIVIL LIBERTIES UNION, IN FOR A PENNY: THE RISE OF AMERICA'S NEW DEBTOR'S PRISONS (2010)). In 2008, The Washington State Minority and Justice Commission issued a report that assessed the problems with the LFO system in Washington. The report points out that many indigent defendants cannot afford to pay their LFOs and therefore the courts retain jurisdiction over impoverished

offenders long after they are released. Legal or background checks show an active court record for those who have not paid their LFOs, which can have negative consequences on employment, on housing, and on finances. *Blazina*, 182 Wn.2d at 836-37.

In *State v. Nolan*, 141 Wn.2d 620, 8 P.3d 300 (2000), the Washington Supreme Court concluded that an award of costs "is a matter of discretion for the appellate court, consistent with the appellate court's authority under RAP 14.2 to decline to award costs at all." The Court emphasized that the authority "is permissive" as RCW 10.73.160 specifically indicates. *Nolan*, 141 Wn.2d at 628. The statute states that the "court of appeals, supreme court, and superior courts *may* require an adult offender convicted of an offense to pay appellate costs." RCW 10.73.160(1)(emphasis added).

In the event the State substantially prevails on appeal, this Court should exercise its discretion and not award costs where the trial court determined that Bougard is indigent. The trial court found that Bougard is entitled to appellate review at public expense due to his indigency and entered an Order of Indigency. CP 204-06. This Court should therefore presume that Bougard remains indigent because the Rules of Appellate Procedure establish a presumption of continued indigency throughout review:

> A party and counsel for the party who has been granted an order of indigency must bring to the attention of the trial court any significant improvement during review in the financial condition of the party. The appellate court will give a party the benefit of an order of indigency throughout the review unless the trial court finds the party's financial condition has improved to the extent that the party is no longer indigent.

RAP 15.2(f).

Accordingly, in *State v. Sinclair*, 192 Wn. App. 380, 367 P.3d 612 (2016), the Court exercised its discretion and ruled that an award of appellate costs was not appropriate, noting that the procedure for obtaining an order of indigency is set forth in RAP Title 15 and the trial court is entrusted to determine indigency. "Here, the trial court made findings that support the order of indigency. . . . We have before us no trial court order finding that Sinclair's financial condition has improved or is likely to improve. . . . We therefore presume Sinclair remains indigent." *Sinclair*, 192 Wn. App. at 393.

As in *Sinclair*, there has been no evidence provided to this Court, and no findings by the trial court, that Bougard's financial condition has improved or is likely to improve. This Court should exercise its discretion to not award costs because Bougard is still presumably indigent.

F. CONCLUSION

"The right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment." *Estelle*, 425 U.S. at 503 (citing *Drope*, 420 U.S. at 172). For the reasons stated, this Court should reverse Mr. Bougard's conviction because he was deprived of his constitutional right to a fair trial.

In the event the State substantially prevails on review, this Court should exercise its discretion and deny any requests for costs.

DATED this 23rd day of January, 2017

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Appellant, Michael Stephen Bougard

DECLARATION OF SERVICE

On this day, the undersigned sent by email, a copy of the document to which this declaration is attached to the Pierce County Prosecutor's Office.

Counsel could not send a copy to appellant, Michael William Bougard, because counsel has not been able to locate him. Mr. Bougard is not in the DOC or County Jail system, mail to his last known address was returned as undeliverable, and his last known phone number is no longer in service.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 23rd day of January, 2016.

/s/ Valerie Marushige
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MARUSHIGE LAW OFFICE

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